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# Pearl H. Steffensen v. Smith's Management Corporation : Brief of Respondent

Utah Supreme Court

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DOCKET NO.

910560

IN THE SUPREME COURT OF THE STATE OF UTAH

PEARL H. STEFFENSEN,

Plaintiff/Petitioner/  
Cross-Respondent,

vs.

SMITH'S MANAGEMENT CORPORA-  
TION,

Defendant/Respondent/  
Cross-Petitioner

Case No. 910560

Priority No. 14

BRIEF OF RESPONDENT / CROSS-PETITIONER

Appeal from a decision of the Utah Court of Appeals  
affirming a judgment of the Third Judicial District  
Court for Salt Lake County, State of Utah  
The Honorable Scott Daniels

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UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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PEARL H. STEFFENSEN,	)	
	)	
Plaintiff/Petitioner/	)	
Cross-Respondent,	)	Case No. 910560
	)	
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	)	
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### JURISDICTIONAL STATEMENT

Jurisdiction to hear this case is granted under Utah Code Ann. § 78-2-2(3)(a) (1992). The court may hear Smith's cross-petition pursuant to Rule 48, Utah Rules of Appellate Procedure.

### ISSUES PRESENTED FOR REVIEW

Plaintiff/Petitioner Pearl H. Steffensen has presented the following questions for review:

I. Did the Court of Appeals erroneously apply a harmless error analysis after it determined that the trial court committed error by directing verdict in favor of Defendant/Respondent Smith's Management Corporation ("Smith's")?

II. Did the Court of Appeals erroneously classify foreseeability and, in essence, overrule a Utah Supreme Court case holding that Jury Instruction No. 32 was erroneous but that the error was harmless?

III. Did the Court of Appeals erroneously affirm the exclusion of evidence in contravention of the Utah Rules of Evidence and Utah Supreme Court cases?

Defendant/Respondent Smith's presents this additional question for review:

Did the Court of Appeals erroneously determine that the trial court had erred in partially directing verdict as to activities of Smith's prior to the time it knew the shoplifter was committing a crime and apprehended him?

The issues are questions of law which are reviewed for correctness. State v. Humphrey, 823 P.2d 464, 465 (Utah 1991).



### **STATEMENT OF THE CASE**

Smith's agrees with Mrs. Steffensen's statement of the case except that Smith's motion for partial directed verdict was based upon the argument that training in the area of deterrence and failure to use deterrence were, as a matter of law, not sufficient proximate cause of Mrs. Steffensen's injuries. (R. 1216 at 2-6)

### **STATEMENT OF FACTS**

Although somewhat embellished and conclusory, Mrs. Steffensen's statement of facts is accurate and sufficient for this review. It is important to note that, until Mr. Burnett left the checkout line, Smith's employees only suspected the possibility of shoplifting, not the likelihood. (T. 60-61) The Smith's employees apprehended Mr. Burnett without incident and were accompanying him peacefully to the store's office, nearly arriving before he fled. (T. 136-139) Up until the time Mr. Burnett actually fled, there was no indication that he would do so.

### **SUMMARY OF ARGUMENT**

The central issue in this matter is whether the trial court properly directed partial verdict. There are two items to evaluate prior to directing verdict. The first is whether the plaintiff established, as a matter of law, a prima facie case. The second and subsequent evaluation, relied upon by Mrs. Steffensen, is whether reasonable minds could reach different factual conclusions based upon the evidence. The trial court made its determination by evaluating the law. The Court of Appeals, however, skipped the prima facie case evaluation and looked only to the

second issue. Had it evaluated the facts against the law to determine whether a prima facie case was established, the Court of Appeals would have reached the same conclusion as the trial court: that a directed verdict was proper.

Even if there were an error in granting a partial directed verdict, that error is harmless. The Utah Supreme court has used harmless error analysis in the past in cases dealing with directed verdicts and that analysis is appropriate in this case.

Jury Instruction No. 32 is, in substance, consistent with Utah law on foreseeability. Even if the minor deviation in the instruction amounts to error, that error is harmless because the outcome of the case would not be different. The Court of Appeals was correct in finding any error to be harmless.

The trial court has discretion in limiting evidence and the exercise of that discretion may be overturned on appeal only by a showing of clear abuse of discretion. The exclusions of evidence to be offered by Mrs. Steffensen's expert are consistent with the language and purpose of Utah's rules of evidence. Mrs. Steffensen has failed to show clear abuse of discretion by the trial court, both before the Court of Appeals and in the present review. Absent this abuse of discretion, the trial court's evidentiary rulings must stand.

The Court of Appeals was correct in upholding the trial court's evidentiary rulings.

The only serious error in the Court of Appeals decision on review of this case is its finding that the trial court erred in directing a partial verdict. Even in light of that, Mrs. Steffen-

sen has failed to make the required showing of substantial prejudice to overcome the proper conclusions that any errors committed were harmless.

### ARGUMENT

Much of the argument in this case involves the concept of "likelihood" as opposed to "possibility" or "suspicion." For this reason it is helpful to examine some definitions of the applicable terms.

**likelihood.** probability. Clark v. Welch, C.C.A. Mass., 140 F.2d 271,273. The word imports something less than reasonably certain.

**probable.** Having the appearance of truth; having the character of probability; appearing to be founded in reason or experience. Having more evidence for than against; supported by evidence which inclines the mind to believe, but leaves some room for doubt; likely.

**possible:** Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to nature of things; neither necessitated nor precluded; free to happen or not; contrasted with impossible. In another sense, the word denotes improbability, without excluding the idea of feasibility.

Black's Law Dictionary, 5d (1979) (emphasis added). Compare, Webster's Encyclopedic Unabridged Dictionary of the English Language (1989). Note that likelihood is less than certainty but more than possibility.

### POINT I

THE TRIAL COURT PROPERLY DIRECTED VERDICT TO EXCLUDE EVIDENCE OF ACTIONS PRIOR TO THE POINT AT WHICH SMITH'S HAD A DUTY TO PROTECT MRS. STEFFENSEN FROM THE ACTS OF THE SHOP-LIFTER. THE COURT OF APPEALS' DETERMINATION THAT THE DIRECTED VERDICT WAS IMPROPER WAS ERRONEOUS.

The real issue in this case is whether the trial court properly directed verdict in favor of Smith's. The trial court could have simplified this case by directing a verdict on the basis that, as a matter of law, the evidence did not support a breach of a subsequently arising duty. Instead it entered the realm of proximate cause. The Court of Appeals erroneously implied that the directed verdict was improper, based solely on an analysis of proximate cause, and then determined the error to be harmless. This holding unnecessarily complicates this case.

At trial and before the Court of Appeals, Mrs. Steffensen concentrated her evidence and arguments on the issues of training in and exercise of deterrence. Inadequate attention was given to proving that the actions after Mr. Burnett's apprehension caused Mrs. Steffensen's injuries. Only in her brief before this court does Mrs. Steffensen attempt to raise post-apprehension actions as causation and only then as they relate to the exclusion of evidence as to Smith's training program. It is in context of this emphasis on training in deterrence that the trial court evaluated Smith's motion for partial directed verdict.

There are two steps required in the proper analysis of whether a directed verdict is appropriate. First, the court must determine whether the evidence presented is legally sufficient to establish a prima facie case. After deciding this threshold question, the court then must evaluate, as discussed by petitioner, whether reasonable minds could differ as to the conclusion arising from the evidence. If the evidence does not, as a matter of law, establish a prima facie case, it is unnecessary for the court to

address the second question.

**A. IT IS THE RESPONSIBILITY OF THE TRIAL COURT TO DETERMINE WHETHER THE EVIDENCE PRESENTED ESTABLISHES A PRIMA FACIE CASE. A DIRECTED VERDICT IS A PROPER METHOD OF DEALING WITH EVIDENCE WHICH DOES NOT MEET THIS TEST.**

It is up to the court to determine whether the evidence presented by a party establishes a prima facie case. DeMille v. Erickson, 462 P.2d 159, certiorari denied 90 S.Ct. 1531, 397 U.S. 1079, 25 L.Ed.2d 814. A motion for directed verdict is a proper method of testing the legal sufficiency of the evidence (i.e., whether a prima facie case has been established). Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608, 611 (Utah 1982).

On appeal of a directed verdict, the Supreme Court determines whether the evidence, viewed in a light most favorable to the party against whom the verdict was directed, establishes a prima facie case. Highland Construction Co. v. Union Pacific Railroad Co., 683 P.2d 1042, 1045 (Utah 1984). In Cerritos Trucking, the Supreme Court evaluated the defendants' evidence in light of established case law and authorities, concluding as a matter of law that the evidence did not and could not establish a prima facie case and holding that a directed verdict was proper. Cerritos Trucking at 611-12.

The critical determination in the present case is whether Mrs. Steffensen's evidence could, as a matter of law, have established a prima facie case of negligence against Smith's.

B. AS A MATTER OF LAW, SMITH'S OWED NO DUTY TO PROTECT MRS. STEFFENSEN FROM ACTS OF MR. BURNETT PRIOR TO HAVING KNOWLEDGE THAT A CRIME WAS BEING COMMITTED. LIKEWISE, AS A MATTER OF LAW, EVIDENCE AS TO LACK OF DETERRENCE TRAINING OF STORE PERSONNEL PRIOR TO THE TIME KNOWLEDGE OF A CRIMINAL ACT EXISTED COULD NOT ESTABLISH A PRIMA FACIE CASE.

It is well-established law that four elements make up a prima facie case of negligence: (1) duty owed by the defendant to the plaintiff, (2) breach of that duty, (3) injury to the defendant, and (4) proximate (legal) cause. E.g., Steffensen v. Smith's Management Corp., 820 P.2d 482, 486 (Utah App. 1991). If, as a matter of law, Smith's owed no duty to the plaintiff, evidence of actions prior to the time the duty arose is irrelevant to the issue of Smith's negligence.

Utah law imposes no duty on Smith's prior to the time it knows that a criminal act is likely to occur. Dwiggins v. Morgan Jewelers, 811 P.2d 182 (Utah 1991). A business owner is not an insurer of the safety of its business invitees. Id.

Comment f to section 344 [Restatement, (Second) Torts] makes it clear that the possessor "is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of a third person are occurring, or are about to occur." (Emphasis added.) Consistent with our earlier cases, we follow the Restatement and hold that this duty exists in Utah, but recognize that the duty does not arise until the business owner knows, or should know, that criminal acts are likely to occur.

Dwiggins at 183 (emphasis in original). Note that the standard is likelihood and not possibility or suspicion. If there is no duty, the trial court need not address the secondary issues related to the negligence claims. Id.

The evidence presented at trial did not show that Smith's

knew or should have known that Mr. Burnett was going to commit a crime. True, Smith's employees suspected the possibility of shoplifting. Steffensen v. Smith's at 485. Even so, that suspicion did not amount to knowledge that a criminal act was likely to occur. In fact, Mr. Burnett got into line at the checkout stand, an act which would suggest the unlikelihood of a crime being committed. Smith's did not know that a criminal act was likely to occur until Mr. Burnett left the checkout line and walked toward the exit.

As a matter of law, Smith's owed no duty to protect Mrs. Steffensen until the point at which Mr. Burnett left the checkout line and proceeded to the door. Dwiggins at 183. It could not breach that duty until it arose. As such, it had no duty to use deterrence measures prior to knowing a crime was likely to occur. Evidence of actions or inactions by Smith's prior to the time its duty arose are irrelevant to the issue of proximate cause based upon breach of that duty. Stated differently, evidence of actions or inactions taken prior to the establishment of the duty do not support a prima facie case based upon breach of that duty.

**C. THE TRIAL COURT PROPERLY DIRECTED A PARTIAL VERDICT BASED UPON MRS. STEFFENSEN'S FAILURE TO ESTABLISH A PRIMA FACIE CASE. THE COURT OF APPEALS' DETERMINATION THAT THE DIRECTED VERDICT WAS IMPROPER IS ERRONEOUS.**

Smith's requested a partial directed verdict that, as a matter of law, even if its employees had been inadequately trained in matters of deterrence and failed to properly deter, those actions occurred prior to the time the duty arose and were not a breach of the subsequent duty, so that any lack of training and deterrence

were not the proximate cause of Mrs. Steffensen's injury. The trial court instructed the jury that "all Smith's conduct prior to the stop and detention of Mr. Burnett should not be considered by the jury." Steffensen at 485-86. In essence, the trial court determined that, as a matter of law, prior to the time of apprehension there was no duty and therefore the acts or omissions prior to apprehension could not proximately (legally) cause the injuries.

The trial court exercised its responsibility to determine, as a matter of law, that a prima facie case was not established by the evidence. Viewing all of the excluded evidence in a light most favorable to Mrs. Steffensen, it is clear that it dealt with actions and inactions prior to the time a duty was established by law. Consistent with the rationale in Cerritos Trucking, Mrs. Steffensen could not establish a prima facie case on those facts and the directed verdict was proper.

The Court of Appeals evaluated only whether reasonable minds could differ as to whether the excluded evidence supported Mrs. Steffensen's allegations of Smith's negligence. It failed to analyze whether the evidence, as discussed above, established a prima facie case and failed to determine whether, as a matter of law, the directed verdict was proper. Without addressing this first crucial step, the Court of Appeals erroneously concluded that the directed verdict was improper.



## POINT II

**EVEN IF THE DIRECTED VERDICT WERE ERRONEOUS,  
THE COURT OF APPEALS COULD PROPERLY HOLD THAT  
ERROR TO BE HARMLESS.**

**A. A HARMLESS ERROR STANDARD IS APPROPRIATELY APPLIED TO DIRECTED VERDICTS AND HAS BEEN USED BY THIS COURT IN THE PAST.**

Mrs. Steffensen argues that "A directed verdict is only appropriate when the trial court is unable to conclude that reasonable minds would not differ on the facts from the evidence presented." (Petitioner's Brief, p. 11) As discussed in Point I, this is only the second of a two step analysis in determining whether to direct a verdict. If this two step analysis had produced an improper directed verdict, Mrs. Steffensen would still have to show prejudice such that the error did not amount to harmless error.

Mrs. Steffensen claims that this Court has never, in forty years, held an erroneous directed verdict to be harmless error. That does not conclusively support her position that harmless error analysis does not apply to directed verdicts. In fact, this Court has on at least two occasions applied harmless error analysis in appeals of directed verdicts.

In Martineau v. Anderson, 636 P.2d 1039 (Utah 1981) the Supreme Court applied a harmless error analysis to deal with an alleged error in the trial court's denial of a directed verdict in favor of plaintiff. Without deciding whether the refusal to direct a verdict was error, the court determined that if it were error, it would be harmless. Id. at 1042.

In Cerritos Trucking Co. v. Utah Venture No. 1, 645 P.2d 608

(Utah 1982) the Supreme Court also applied a harmless error analysis, concluding that the trial court erred in weighing the evidence prior to directing the verdict but holding that the actions "did not result in prejudicial error since the defendants were not entitled to succeed in any event." Id. at 613.

This matter is complicated by the Court of Appeals' analysis of the directed verdict issue as being one only of credibility of the evidence. However, as in Cerritos Trucking, Mrs. Steffensen's evidence failed to legally establish a cause of action such that she could not succeed, regardless of whether reasonable minds could differ on the factual interpretation of the evidence. Beyond that, Mrs. Steffensen has failed to show that any error in directing the verdict was substantial and prejudicial.

**B. IF THE DIRECTION OF A VERDICT IN THIS MATTER WERE ERROR, THE HARMLESS ERROR ANALYSIS WOULD LEAD TO THE CONCLUSION THAT THE ERROR WAS HARMLESS.**

Mrs. Steffensen cannot be permitted now, on her second appeal, to cure the failure to properly present her case at trial. In order to prevail on this issue, she must show that any error was prejudicial in that it substantially affected the outcome of her case as it was presented to the jury.

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or otherwise disturbing a judgment or order . . . The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, Utah Rules of Civil Procedure (emphasis added). Upon

appeal, the appellant has the burden of proving the prejudicial nature of the error, i.e. that there is "a reasonable likelihood that the error affected the outcome of the proceedings." Steffensen v. Smith's at 489, quoting State v. Verde, 770 P.2d 116, 120 (Utah 1989). Note that the standard is "reasonable likelihood" not possibility.

The Court of Appeals noted that the "the jury's verdict would not have differed had the trial judge not granted Smith's partial directed verdict." Steffensen v. Smith's at 490. In fact, the jury found that Smith's was negligent.

Mrs. Steffensen has failed to present any evidence that, but for the directed verdict, the outcome would have been different. The evidence excluded by the directed verdict supported the claims of negligence. The jury found negligence. The true issues of proximate cause are unrelated to the evidence excluded by the directed verdict. Therefore, the outcome would not likely have been different--possibly perhaps, but not likely.

Because there is no likelihood of a different outcome, any error in directing verdict is, as concluded by the Court of Appeals, harmless error.

### POINT III

**THE SUBSTANCE OF JURY INSTRUCTION NO. 32 IS  
CONSISTENT WITH UTAH CASE LAW. EVEN IF GIV-  
ING THE INSTRUCTION WAS ERROR, IT WAS HARM-  
LESS.**

The Utah Supreme Court in Rees v. Albertson's, Inc., 587 P.2d 130, 133 (Utah 1978) clarified the definition of foreseeability stating that it must be reasonably foreseeable "not that the par-

ticular accident would occur, but only that there is a likelihood of an occurrence of the same general nature." The key to foreseeability is likelihood, not possibility.

In Instruction No. 32, the trial court set forth the definition of foreseeability compatible with Rees. In the second paragraph of the instruction, the court attempted to instruct the jury that the issue of foreseeability goes beyond mere possibility and more toward probability or predictability. Clarification of this element is consistent with the Rees definition that foreseeability is based upon likelihood, a standard higher than possibility.

It is unfortunate that Mr. Burnett's name was specifically included in the instruction. This did not, however, force the jury to deal specifically with the actions of a single shoplifter. The instruction could just as easily have said:

In determining what is foreseeable, you must determine that it was predictable and not merely a possibility that a shoplifter would flee and collide with plaintiff.

The outcome would have been the same. Because Mr. Burnett was the shoplifter in question, the jury would naturally use his actions as the basis for their determination. That the jury might use the actions of Mr. Burnett as the basis for determining the issue of foreseeability does not make the instruction erroneous.

The Court of Appeals noted that "Mrs. Steffensen's experts testified that approximately five percent of all shoplifters, when apprehended, run." Steffensen v. Smith's at 489. Undeniably a five percent occurrence falls more in the realm of possibility than of likelihood or probability. No evidence was given of the

occurrence of customer injury when a shoplifter runs (the shoplifter who runs is trying to get away and not run into people), but it is certainly less than 100% and probably less than 50%. If injuries occur in fewer than 50% of instances where the shoplifter runs, that also falls in the realm of possibility. Where there is a possibility of a possibility, the likelihood standard of foreseeability is clearly not met.

Even if Instruction No. 32 were erroneous, it is unlikely that the jury would find the injury foreseeable by the Rees standard. Mrs. Steffensen has failed to present evidence that, but for the erroneous jury instruction, the outcome would likely have been in her favor. Again, the mere possibility of a different verdict is insufficient. Because the outcome would not be different, any such error must be deemed harmless and therefore non-reversible. The Court of Appeals was correct in holding any error in Instruction No. 32 to be harmless.

#### POINT IV

##### **THE COURT OF APPEALS CORRECTLY UPHELD THE TRIAL COURT'S EVIDENTIARY RULINGS EXCLUDING THE EVIDENCE OF MRS. STEFFENSEN'S EXPERT.**

##### **A. THE COURT OF APPEALS ERRED IN FINDING ERROR IN EXCLUDING EVIDENCE AS TO SMITH'S TRAINING PROGRAM, BUT WAS CORRECT IN CONCLUDING THE ALLEGED ERROR TO BE HARMLESS.**

The trial court has broad discretion to decide whether or not evidence submitted is relevant. Bambrough v. Bethers, 552 P.2d 1286, 1290 (Utah 1976). If the evidence is not relevant, it is inadmissible. Rule 402, Utah Rules of Evidence. Even if the evidence is relevant, it may be excluded at the discretion of the

court. Rule 403, Utah Rules of Evidence; Terry v. Zions Cooperative Mercantile Institution, 605 P.2d 304, 322 (Utah 1979). It is up to the trial court to balance the questions of probative value against prejudicial or confusing effects. State v. Gibson, 565 P.2d 783, 786-7 (Utah 1977). When it comes to evidence, "It is generally conceded the trial court is more competent in the exercise of this discretion, to judge the exigencies of a particular case." Terry v. Zions at 322. The judgment of the trial court may not be reversed absent a showing of clear abuse of discretion. State v. Gibson at 787; Bambrough v. Bethers at 1290.

As observed by the trial court in chambers, the evidence related to Smith's training program was irrelevant to the liability questions surrounding the detention of Mr. Burnett.

"[I]f they had the worst training program in the world but the situation were handled adequately, there would be no liability here. . . And if the situation is handled improperly, it doesn't matter whether they have the best training program in the world, the thing is how it was handled. If they had an inadequate training program, but it was still handled properly, that's not the proximate cause of anything."

(T. 339-340).

Even if the testimony about the training program were relevant, it would serve no purpose and was likely to confuse the jury and distract them from the core issues of the case. As such, the evidence was inadmissible at the discretion of the court.

Mrs. Steffensen failed to demonstrate before the Court of Appeals that exclusion of the testimony was a clear abuse of discretion. The Court of Appeals should not, therefore, have substi-

tuted its judgment for that of the trial court and should have upheld the trial court's evidentiary ruling.

Even so, the Court of Appeals was correct in noting that the jury found Smith's negligent, making any error harmless. Steffensen v. Smith's at 491.

**B. THE COURT OF APPEALS PROPERLY UPHELD THE TRIAL COURT'S EXCLUSION OF TESTIMONY FROM MRS. STEFFENSEN'S EXPERT AS TO APPORTIONMENT OF NEGLIGENCE.**

Mrs. Steffensen argues that her expert should have been permitted to testify because Rule 704, Utah Rules of Evidence permits opinion testimony even if it reaches a legal conclusion. It is true that the testimony of an expert is generally admissible even if it deals with the ultimate issues of the case. The ultimate issue argument does not apply here, however. There is no legal consensus taking the same position regarding the question of apportionment. In fact, Utah law holds the issue of apportionment of fault as a matter for the jury. Lamkin v. Lynch, 600 P.2d 530, 531 (Utah 1979). Although apportionment may, by strict definition, be an "ultimate issue," it goes beyond determination of negligence and is a function restricted to the jury.

Even if expert witness testimony were deemed admissible on the question of apportionment, Mrs. Steffensen failed to provide proper foundation for her expert's qualifications to apportion fault. Lacking proper foundation, the expert's testimony would be inadmissible. Edwards v. Didericksen, 597 P.2d 1328 (Utah 1979).

Again, the proper standard for reversing an exclusion of evidence is clear abuse of discretion. Mrs. Steffensen made no such showing before the Court of Appeals nor has she done so here.

The trial court properly excluded the expert witness testimony and the Court of Appeals correctly upheld that exclusion.

**POINT V**

**MRS. STEFFENSEN HAS FAILED TO DEMONSTRATE  
PREJUDICE WHICH WOULD JUSTIFY REVERSAL OF THE  
TRIAL COURT'S EVIDENTIARY DECISIONS ON THE  
BASIS OF ERROR.**

Where an exclusion of evidence does not affect the substantial rights of the parties, a judgment cannot be disturbed and the court must disregard the error. Rule 61, Utah Rules of Civil Procedure. The appellate court may reverse the trial court's judgment only "if there is a reasonable likelihood that, absent the error, there would have been a result more favorable to the [appellant]." Matter of Estate of Kesler, 702 P.2d 86, 96 (Utah 1985), citing Lee v. Mitchell Funeral Home Ambulance Serv., 606 P.2d 259, 261 (Utah 1980) and Rowley v. Graven Bros, 26 Utah 2d 448, 451, 491 P.2d 1209, 1211 (1971). As noted above, a reversible error must be "substantial and prejudicial" and the appellant has the burden of showing that error. Steffensen v. Smith's at 489. See also Rigtrup v. Strawberry Water Users Ass'n, 563 P.2d 1247, 1251, n.11 (Utah 1977); Redevelopment Agency of Salt Lake City v. Barrutia, 526 P.2d 47, 51 (Utah 1974). The mere fact that a verdict was entered against Mrs. Steffensen is insufficient to show prejudicial error. She must clearly demonstrate that the outcome would have been different and in her favor.

Mrs. Steffensen has failed to show that she was prejudiced by the trial court's evidentiary rulings. The only implications that the outcome would have been different lie in her conclusory state-



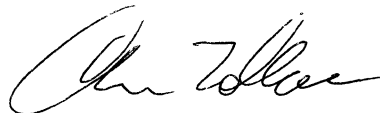
ments to that effect. Not only has she failed to show prejudice, Mrs. Steffensen has failed to demonstrate the substantial prejudice required by Rule 61, U.R.C.P. and by Utah case law. Therefore, even if this court finds error in the trial court's evidentiary rulings or the holdings of the Court of Appeals, that error is not reversible.

### CONCLUSION

The only serious error committed by the Court of Appeals was its failure to properly analyze the basis for granting a directed verdict leading to the conclusion that directed partial verdict was improper. This portion of the decision of the Court of Appeals should be reversed.

Even if errors occurred as outlined by Mrs. Steffensen, she has failed to meet the burden of establishing substantial prejudice or showing clear abuse of discretion sufficient to overcome the trial court's rulings or challenge the Court of Appeals decision in this case. Because any errors are harmless errors, the overall decision of the Court of Appeals' affirmation should be affirmed by this Court.

Respectfully submitted the 31st day of July, 1992.



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Christopher A. Tolboe  
MURPHY, TOLBOE & MABEY

**CERTIFICATE OF MAILING**

I hereby certify that I caused four (4) true and correct copies of this Respondent/Cross-Petitioner's Brief to be mailed, postage prepaid, this 24<sup>th</sup> day of July, 1992, to the following:

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